IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

CIVIL APPLICATION NO.599 OF 2005.

IN

CROSS OBJECTION ST.NO.28767 OF 2004.

IN

FIRST APPEAL NO.57 OF 2005

Mohanlal Ghanshyamdas Kukreja : Applicant.

versus

Hiralal G. Kukreja & ors. : Respondents.

Mr.Ashok Jain i/by A.V.Jai Associates for the applicant.

Mr.Makhija with Ms.Preeti Shah for respondents.

ALONG WITH

CIVIL APPLICATION NO.127 OF 2005.

IN

FIRST APPEAL NO.57 OF 2005

Hiralal G. Kukreja & ors. : Applicants.

versus

Mohanlal Ghanshyamdas Kukreja

& Anr. : Respondents.

Mr.Makhija with Ms.Preeti Shah for applicants.
Mr.Ashok Jain i/by A.V.Jai Associates for the respondents.

CORAM : D.G.DESHPANDE,J.

DATED : 16th September 2005.

ORAL ORDER

1. Civil Application No.599 of 2005 is filed by the original defendant in the suit before the City Civil Court vide Suit No.1787 of 1984. Decree passed in that suit has been challenged by the original plaintiffs. The original defendant has filed Cross Objection.

2. Civil Application No.127 of 2005 is filed by the original plaintiffs. That application is for injunction and stay.

3. The plaintiffs and the defendant are the brothers. From the undisputed facts the suit property was purchased by the defendant/applicant [herein after referred to as the defendant only]

on 5th July 1976 under the agreement of purchase. Thereafter he filed a suit for specific performance vide Suit No.1636 of 1976. He joined his mother and other brothers as plaintiffs in that suit. That suit came to be decreed in pursuance to the consent terms filed on 25th October 1982. It is specifically mentioned that the possession of the suit property was handed over to all. Therefore from the date of the consent terms this defendant came to be joint owner of the property along with others. In 1984 other brothers filed a suit. That suit came to be dismissed by principle of res-judicata. This defendant filed a suit in the High Court for partition of his share in 1986. Preliminary decree for partition has been passed in that suit in 2001 i.e. on 10th September 2001. The plaintiffs have filed an appeal against that decree and, in the Notice of Motion taken out by the plaintiff this Court passed an order on 2nd July 2002 to the effect that no stay to the decree was granted but it was directed that physical partition of the bungalow will not be affected.

4. While the suit before the High Court was

pending, the plaintiffs had also filed another suit being Suit No.1787 of 1984 before the City Civil Court. That was a suit for injunction that the present defendant is creating problem. This was, according to Mr.Makhija, before the suit of the defendant for partition before the High Court. That suit has been dismissed and, therefore, the present appeal, wherein the defendant has filed the cross objection.

5. By this Civil Application No.599 of 2005 the defendant wants that a receiver be appointed and he may be placed in possession of one bedroom, hall and kitchen on the first floor of the suit bungalow. Whereas in Civil Application No.127 of 2005 the plaintiffs in Suit No.1787 of 1984 are praying for stay and injunction.

6. Learned Counsel Mr.Makhija, appearing for the plaintiffs, strongly opposed the prayers of the defendant for appointment of receiver firstly on the ground that injunction is running against the defendant since last 21 years; he has never been in possession; the suit property is not divisible; even if the receiver is appointed, the receiver cannot separate the property and

give any specific portion or property in possession of defendant. Even the High Court as per the order dated 2nd July 2002, referred to above, has directed that physical partition of the Bungalow will not be affected and in the affidavit filed by the present defendant before the court receiver, he has also admitted that bungalow is not physically divisible. Learned Counsel Mr.Makhija has shown his willingness of going for sale of the bungalow and giving the defendant his legitimate share. This offer is given because the bungalow cannot be divided.

7. From the other hand, the counsel for the defendant strenuously urged and contended that there cannot be any dispute that defendant Mohanlal has 18% almost 1/6th share in the property. He has originally purchased this property under the agreement of sale dated 5th July 1976. Then in the suit filed by him for the specific performance, he joined the other members as the plaintiffs in that suit. A decree came to be passed by virtue of the consent terms and all were placed in possession and, now by a decree, which has been passed by this Court, his right of common enjoyment was recognised, accepted by this

Court. He contended that in these circumstances, whether the defendant Mohanlal was in possession of the property or not; whether injunction is there against him or not, he has now become entitled for possession.

8. I have given my anxious consideration to the submissions made by both the learned counsel for the respective parties. Considering all the facts mainly the fact that defendant Mohanlal has a right in the property and the right, whether it is decreed by this court or not, originates from the consent decree where the possession was given to all of them jointly. Therefore right from the date of the consent decree, the defendant Mohanlal is a joint owner of the property. Whether he is ousted or disallowed from the enjoyment of the property legally or illegally is not the issue today. But the fact remains that a joint owner has been required to be discontinued from the enjoyment of property during this period. Now by virtue of decree in his favour, he has become entitled to and even if there is direction of the Court that Bungalow is not to be physically partitioned then without affecting that order of this Court, a Court Receiver has to

be appointed in this case. Putting a party out of enjoyment of the possession for number of years cannot be adequately compensated in terms of money. Therefore, the application for stay and injunction of the plaintiffs is rejected. This Application of defendant Mohanlal i.e. Civil Application No.599 of 2005 is allowed. Court Receiver to visit the spot; give one opportunity to the original plaintiffs to offer two rooms and common use of kitchen to the defendant Mohanlal. If they do not accept the offer, within two weeks, the Court Receiver to place the defendant Mohanlal in possession of one bedroom, hall for common enjoyment and kitchen for common enjoyment as an agent of the Court Receiver without any royalty and security. Both the Civil Applications are disposed of. Prayer for staying the operation of this order of appointment of court receiver is rejected. Certified copy expedited.

[D.G.DESHPANDE,J]